Supreme Court, U.S.
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No. 99-386

In The

Supreme Court of the United States

LUHR BROS., INC.,

Petitioner,

v.

ROBERT HANKS,

Respondent.

On Petition For Writ Of Certiorari To The Illinois Appellate Court For The Fifth District

PETITIONER'S REPLY MEMORANDUM

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PETITIONER'S REPLY MEMORANDUM

Respondent, in his opposing brief, misstates the holding in *Panama Railroad v. Johnson*, 264 U.S. 375 (1924), in an apparent attempt to mislead this Court into believing that it has "interpreted the 'election' language as giving only the seaman-plaintiff the right to demand a jury" in a suit at law under the Jones Act. (Brief in Opp., p. 3). Contrary to Respondent's claim, this Court, in *Panama Railroad*, did not hold that the Jones Act gives the plaintiff-seaman the exclusive right to elect between a jury trial and a bench trial. Rather, this Court held that the "election" contemplated by the Jones Act is the choice between proceeding on the admiralty side of the federal court without a jury trial or "on the common-law side of the court with a trial by jury as an incident." *Id.* at 390-91.

Respondent's mischaracterization of *Panama Railroad* is designed to avoid the consequence of his election to pursue his claim in state court. As this Court stated in *Panama Railroad*, "[o]n the [admiralty] side the issues will be tried by the court; but if [the seaman] sues on the common-law side, there will be a right of trial by jury." *Id.* at 391. When Respondent elected to proceed in state court, he necessarily elected to proceed "at law" because state courts, unlike the federal courts, do not recognize the dichotomy of proceeding "at law" versus "in admiralty." Simply put, there is no "admiralty side" to the state courts. Therefore, the right to trial by jury flows as an incident to Respondent's election to pursue his claim at law in the state court.

The importance of resolving the interpretation of the election language of the Jones Act is the principal reason

that this case warrants certiorari. It is significant that Respondent did not contend that the issue lacked sufficient importance for consideration by this Court, but instead sought to avoid certiorari by erroneously contending this Court has already made the interpretation.

Respondent also misrepresents the holding in *McCarthy v. American Eastern Corp.*, 175 F.2d 724 (3d Cir. 1949), when he cites it as support for his claim that the federal courts have unanimously interpreted the election language to give only the seaman-plaintiff the right to demand a trial by jury. The Third Circuit in *McCarthy* echoed this Court's holding in *Panama Railroad*, declaring that "the election to which the Jones Act refers is an election of remedies as between a suit in admiralty and a civil action." *McCarthy*, 175 F.2d at 726. Further, contrary to Respondent's contention, the decision in *McCarthy* is consistent with *Yates v. Dunn*, 223 F.2d 64 (3d Cir. 1955), as *Yates* recognized that the election granted to the plaintiff-seaman is "between a trial by jury and a suit in admiralty." *Yates*, at 66 (quoting *Balado v. Lykes Bros. S.S. Co.*, 179 F.2d 943, 945 (2d Cir. 1950)). Thus, the true import of these cases is that the only manner in which the plaintiff-seaman can force a non-jury trial is to elect to proceed on the admiralty side of the federal court. In his Brief in Opposition, Respondent refuses to acknowledge that, on this basis, the Third Circuit's decisions conflict in principle with *Rachel v. Ingram Corp.*, 795 F.2d 1210 (5th Cir. 1986), and *Craig v. Atlantic Richfield Co.*, 19 F.3d 472 (9th Cir. 1994).

Respondent fails to address, in his opposing brief, the effect of the incorporation of the jury provision of Federal Employers' Liability ("FELA"), 45 U.S.C. § 53,

into the Jones Act. Respondent instead asserts that "the Jones Act's 'election' clause specifically confers on the seaman-plaintiff the right to elect the form of trial." (Brief in Opp., p. 6). Significantly, Respondent does not quote any language from the "election" clause that he contends "specifically confers" the right to elect a non-jury trial in a Jones Act case brought at law. Respondent's failure to quote this supposed "plain language" underscores the fact it does not exist. Rather, the Jones Act provides that "any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, **with the right of trial by jury** . . . " 46 U.S.C. app. § 688(a) (emphasis added). The *Panama* decision, in effect, concluded that the election clause meant what it clearly said. There is, therefore, no conflict between this provision of the Jones Act and § 53 of the FELA.

Respondent further misstates Petitioner's position on the equal protection issue when he erroneously contends that Petitioner is challenging the constitutionality of the Jones Act, a federal statute, and, therefore, there is no state action to trigger application of the Fourteenth Amendment. This contention is faulty because Petitioner's equal protection challenge is directed to the state court's misinterpretation of the Jones Act, not the Jones Act itself. The Jones Act does not prohibit a defendant from demanding and receiving a jury trial in an action filed at law and, therefore, it is the state court's misinterpretation of the Jones Act which is the source of the violation of the Jones Act defendant's right to equal protection. Respondent refuses to accept the fact that this

misinterpretation of a federal statute by the state court constitutes state action.

Finally, Respondent raises a "red herring" by asserting that Petitioner has no basis to challenge the constitutionality of the Jones Act under the Fifth Amendment. It is, and has always been, Petitioner's position that the Jones Act does not grant the plaintiff-seaman the power to oust a defendant of a jury trial at law. Therefore, no Fifth Amendment due process challenge was or could have been made. Respondent, however, devotes considerable space to opposing a Fifth Amendment due process challenge that was never made. This is simply a "red herring" meant to avoid meeting the issue raised, *i.e.*, that the state court's erroneous construction of the Jones Act "election" clause constitutes state action and works an unconstitutional discrimination under the Fourteenth Amendment.

Respectfully submitted,

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